APPENDIX.

Opinion.

SPECIAL COURT OF APPEALS.
CIRCUIT COURT OF CITY OF NORFOLK.

AMERICAN RAILWAY EXPRESS COMPANY, A CORPORATION.

—v—

F. S. ROYSTER GUANO COMPANY, A CORPORATION.

Richmond, Va., February 26, 1925.

Opinion states the facts.

CHRISTIAN, *J.*:

In 1917, the Southern Express Company, that was then doing business in Virginia and other Southern States, had delivered to it, at Richmond, Virginia, on the 27th day of September, 1917, two packages of tax tags, valued at $450, consigned to the F. S. Royster Guano Company, at Norfolk, Virginia. These packages were lost in transit, and the consignee filed claim with the Express Company before July 1, 1918, for its damage by reason of the loss. Prior to this latter date, the Director General of Railroads required all the express companies doing business over the railroads in the United States to merge and consolidate into one express company. This was accomplished by the independent

express companies securing a charter from the State of Delaware, under the name of The American Railway Express Company, to which they conveyed and transferred all of their tangible assets used in the express business, though each of the companies retained their corporate existence, officers and offices. In payment for the assets turned over to the American Railway Express Company according to the value thereof, it issued to each constituent company so much of its capital stock at par as represented its input. The Southern Express Company received in this distribution of stock $1,750,000, which it still holds and owns, with other available assets of approximately $1,000,000. While doing business in Virginia, the Southern Express Company, appointed John D. Hockaday its agent, upon whom process against it might be served. Immediately after the consolidation took place, Hockaday removed from the State and there was no statutory agent left in the State upon whom process could be served.

The F. S. Royster Guano Company brought in the Circuit Court of the City of Norfolk its action of trespass on the case for $600 damages, for the loss above mentioned, against the Southern Express Company, and matured the same on process returnable on the 1st December rules, 1919, which process was served on W. F. Rhea, Chairman of the Corporation Commission, and by immediately transmitting a copy thereof by mail to said company, pursuant to Subsection 3 of Section 1294 of the Code of Virginia, 1904.

The Southern Express Company appeared specially in the case and moved the Court to quash the writ and return because it had ceased to do business in the State

at the time of the issuance of the writ, nor did it have any statutory attorneys therein, the former one having removed therefrom for more than a year. The Court, upon consideration, overruled the motion to quash, and the defendant made no further appearance nor appealed therefrom.

The Circuit Court of the City of Norfolk, at its May, 1920, term, proceeded to hear and determine the case without the intervention of a jury, and the plaintiff being fully heard, the Court entered judgment against the Southern Express Company for the plaintiff for the sum of four hundred and fifty dollars, with interest from the 15th day of May, 1920, till paid. No execution was issued upon this judgment.

At the first July rules, 1922, in the Circuit Court of the City of Norfolk, the plaintiff filed a declaration in debt against the American Railway Express Company upon its judgment against the Southern Express Company, alleging liability upon the defendant by reason of the fact that it had taken over the assets of the Southern Express Company, and that such assets had been distributed to the exclusion and prejudice of its creditors.

The case coming on to be heard by the Court without the intervention of a jury, on the 13th day of April, 1923, judgment was entered for the plaintiff against the defendant for four hundred and sixty-one dollars and forty cents ($461.40), with legal interest on $450 from the 15th day of May, 1920, till paid and its costs. Motion to set aside the judgment was made and overruled, to which the defendant excepted. The case is before this Court on exceptions, for error in overruling the defendant's motion for a new trial, and errors committed in

the course of the trial. For convenience the parties will be spoken of as plaintiff and defendant, as they were in the trial Court.

The first error for consideration is the action of the Court in striking out the defendant's plea of the Statute of Limitations. No execution was issued upon the judgment against the Southern Express Company and Section 6477 Code of Virginia provides:

> "On a judgment, execution may be issued within a year and a *scire facias* or *action* may be brought within ten years after the date of the judgment * * *."

The contention of the defendant was that "a *scire facias*" or *action* was the same or identical proceedings in law. This was not the correct construction of the Statute. The proceeding by *scire facias* in this State is not a new suit, but a continuation of the old suit. Its object is to obtain execution of a judgment which has become dormant by the lapse of time, and it is essential that the writ, which serves the double purpose of a writ and a declaration, shall state all the facts necessary to authorize the relief sought. It should follow the judgment to be revived as to the amount, date and parties. *White* v. *Palmer*, 110 Va. 490.

> "At the common law, an action of debt will lie on a judgment as soon as it is recovered, and *without regard to the plaintiff's right to take out execution;* for the remedy by execution is cumulative merely, and the statutes giving this remedy do not impair the common law right of action on the judgment as a debt of record." Black, Judg-

ments, Sec. 958. *Hickman* v. *Macon Co.*, 42 Fed. 759; *Wilson* v. *Hatfield*, 121 Mass. 551; *Stewart* v. *Peterson*, 63 Pa. St. 230; *Kingsland* v. *Forest*, 18 Ala. 519, 52 Am. Dec. 232.

The Statute of Virginia recognizes the action of debt as at common law, and fixes the limitation at ten years. The plea of the Statute of Limitations was properly stricken out.

The next error alleged is that the Circuit Court of the city of Norfolk was without jurisdiction of the Southern Express Company, and that the judgment of the plaintiff was void. This matter was submitted to the Court, in that action, upon a motion to quash the return because the service was illegal, and was decided adversely to the company; and having appeared specially, no further appearance was made in the case nor effort to have same reviewed. It is well settled "that defects or irregularities in the process or in the manner of its service, are not sufficient to render the judgment void, unless the flaw or omission is so serious as to make the process equivalent to no process at all, or the service entirely nugatory, in which case the judgment fails for want of jurisdiction. It follows that a judgment of a court of general jurisdiction cannot be attacked collaterally when there has been some service of notice although such service of notice may be materially defective." Black, Judgments, Sec. 263. *Murray* v. *Weigle*, 118 Pa. St. 159, 11 Am. Rep. 781; *Allison* v. *Rankin*, 7 Serg. & R. 269.

It need scarcely be added that if the judgment sued on be a foreign judgment, or one rendered in a sister

State, the question of jurisdiction is always open to inquiry. Black, Judgments, Secs. 818, 835, 894-915. The cases cited and discussed before the Court are of this latter character and are therefore not authority upon the question of jurisdiction before this Court.

The Circuit Court of the city of Norfolk, a court of general jurisdiction, having jurisdiction of the subject matter and parties, upon the service of process adjudged by it to be valid and not void upon its face, is conclusive in Virginia upon other courts, and not open to collateral attack. This principle is not merely an arbitrary rule of law established by the courts, but it is a doctrine which is founded upon reason and the soundest principles of public policy. "It is one which has been adopted in the interest of the peace of society and the permanent security of title. If, after the rendition of a judgment by a court of competent jurisdiction, and after the period has elapsed when it becomes irreversible for error, another court may in another suit inquire into the irregularities or errors in such judgment, there would be no end to litigation and no fixed established rights." *Lancaster* v. *Wilson*, 27 Gratt. 624, 629. *Voorhees* v. *The Bank of the United States*, 10 Peters (U. S.), 449, 474; *Wilcher* v. *Robertson*, 78 Va. 602.

The Southern Express Company had not been denied "due process" of law, and the judgment against it was properly admitted in evidence.

The other assignments of error are based upon the claim of the defendant that the evidence does not prove that the Southern Express Company was merged and consolidated into the American Railway Express Company, and that the Southern Express Company still

maintains its corporate existence, and that such merger was by compulsion of the Director General of Railroads.

It is uncontroverted that the Southern Express Company turned over its business and property used in its business, along with another express company, for its proportionate share of the stock of the defendant, and ceased to do an express business, nor were any assets left in the State of Virginia to pay the obligations of the Southern Express Company.

The case of *American Railway Express Company* v. *Downing*, 132 Va. 139, in an able and exhaustive opinion by Judge Sims, settled the law in Virginia in reference to the merger of the Southern Express Company and others in to the defendant company as a consolidated corporation, liable for the debts of the constitutent companies. The following is the law on the subject as therein stated: "When two or more corporations are consolidated into a new corporation with a new name, and the constituent corporations go out of existence, if no arrangements are made respecting their property and liabilities, the consolidated corporation will be answerable for their liabilities, at least to the extent of the property acquired from the constituent corporation whose liability is sought to be enforced against the consolidated corporation." As to the constituent corporation *going out of existence*, it is held: "It is not essential to the liability of the corporation for the debts or claims against its constituent corporations that the constituent companies cease to exist *de jure* upon the organization of the new corporation. The going out of existence of the constituent companies is the cessation of all actual transactions of business as a going concern. Its con-

tinued existence *de jure* for the purpose of winding up its affairs is immaterial." *Am. Ry. Ex. Co.* v. *Downing, supra.*

The principles upon which the cases are based, are that the assets of the constituent corporations are a trust fund for payment of their debts, and when the consolidated corporation takes over the assets in exchange for stocks and bonds, there is an implied contract in law to pay such debts out of the assets.

The judgment of the Circuit Court is plainly right, and will be affirmed.

Affirmed.

A copy, Teste:

(Name illegible)
C. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

NO. ~~477~~ 116

AMERICAN RAILWAY EXPRESS COMPANY,
Plaintiff in Error.

vs.

F. S. ROYSTER GUANO COMPANY,
Defendant in Error.

IN ERROR TO THE SPECIAL COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF FOR DEFENDANT IN ERROR.

CADWALLADER J. COLLINS,
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Law Building, Norfolk, Va.

SUBJECT INDEX.

TABLE OF CASES.

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BRIEF FOR DEFENDANT IN ERROR.

On the 4th day of May, 1925, notice was served on counsel for respondent that on the 18th day of May, 1925, application would be made for a writ of certiorari in this case. The application was actually made on May 25th, 1925, without notice to counsel for respondent of the change of date. It is respectfully submitted that the court's requirements on application for writs of certiorari have not been complied with.

STATEMENT OF THE CASE.

The defendant in error is unable to acquiesce in the argumentative statement of this case as set forth in the transcript of the record and petition for a writ of certiorari and therefore submits the following statement of the case:

On the 27th day of September, 1917, there was delivered to the Southern Express Company at Richmond, Virginia, two packages of fertilizer tax tags for shipment to the F. S. Royster Guano Company at Norfolk, Virginia, which were lost in transit. The F. S. Royster Guano Company filed its claim with the Southern Express Company in due time, and after much correspondence, that brought forth no results, it commenced an action at law, in September, 1919, in the Circuit Court for the City of Norfolk, Virginia, against the Southern Express Company for the recovery of the value of the tax tags. During the time its claim was in the hands of the Southern Express Company, that is to say, on the 1st day of July, 1918, the Southern Express Company transferred its business and all of its tangible property in Virginia, and elsewhere, to the American Railway Express Company (plaintiff in error), and received in exchange therefor 10,000 shares of stock of said American Railway Express Company, of the value of one hundred ($100) dollars each (R. pp. 18-21). It was known to the public in general that the American Railway Express Company had taken over the Southern Express Company, and other express companies, but this was supposed to be for the period of the war only, and defendant knew nothing

about the details of this transfer until long after it had entered suit against the Southern Express Company; in fact, its first knowledge of the details of the transfer was obtained from the case of *American Railway Express Company* v. *J. W. Downing*, 132 Va., 139.

The Southern Express Company is, or was in 1919, incorporated under the laws of the State of Georgia and when process was issued in this case, it was ascertained that John B. Hockaday, the appointed agent upon whom process against the Southern Express Company had before that time been served, had been removed from the State of Virginia, and that no person residing in Virginia had been appointed in his place, and therefore process was, on the 16th day of September, 1919, served on Hon. William F. Rhea, chairman of the State Corporation Commission, under the authority of clause 3, section 1294-G, Pollard's Code, 1904. A transcript of sub-sections 2 and 3 of section 1294-G of the Code of 1904 of Virginia, is set forth at pages 7 and 8, and of service of process upon the Southern Express Company at pages 27-28 of the record.

On the 18th day of November, 1919, the Southern Express Company appeared specially and moved the court to quash the service and writ on the ground that at the time of the service it had no agent in Virginia on whom process could lawfully be served, but the court overruled the motion and no exception to this ruling having been taken, the case came on to be tried in May, 1920, when plaintiff recovered judgment for its claim with interest. A copy of the special plea setting up the motion to quash the service and writ in the

action of the F. S. Royster Guano Company against the Southern Express Company is set forth at page 29 of the record.

In Virginia debt is the proper remedy when an action is brought on a judgment and having ascertained that the American Railway Express Company had acquired the assets of the Southern Express Company and issued stock therefor, the F. S. Royster Guano Company filed its action of debt against the American Railway Express Company, in April, 1923, and in due time recovered a judgment which was, on appeal, affirmed by the Special Court of Appeals of the State of Virginia. This case is reported in 126 S. E., 678, and a copy of the opinion of the court is appended to the appellant's petition for a writ of certiorari.

BRIEF OF ARGUMENT.

A STATE MAY VALIDLY PROVIDE FOR SERVICE OF PROCESS UPON A FOREIGN CORPORATION WHICH HAS CEASED TO DO BUSINESS WITHIN THE STATE IF THE CAUSE OF ACTION AROSE IN THE STATE BEFORE THE WITHDRAWAL.

On the 27th day of September, 1917, the F. S. Royster Guano Company delivered two packages of tax tags to the Southern Express Company at Richmond, Virginia, for shipment to Norfolk, Virginia, which were lost in transit, and in September, 1919, it commenced an action at law against the Southern Express Company for the recovery of the value of these tax tags. On or about the 1st day of July, 1918, the Southern Express Company, a Georgia corporation, transferred its business and property in Virginia to the American Railway Express Company and at the same time revoked the designation of John B. Hockaway as its agent in Virginia, upon whom process might be served, and having failed to appoint any person in his place, process in the action against the Southern Express Company was, on the 16th day of September, 1919, served on the chairman of the State Corporation Commission as provided by Section 1294-G, Pollard's Code 1904 (R. pp. 7-8). In May, 1920, the Circuit Court for the city of Norfolk, Virginia, rendered judgment against the Southern Express Company for the value of the aforesaid tax tags and upon this judgment the F. S. Royster Guano Company brought an action

of debt against the American Railway Express Company in which action judgment was rendered by the trial court against the American Railway Express Company and this judgment was sustained by the Special Court of Appeals of Virginia. The first ground of error assigned in the petition of the American Railway Express Company for a writ of certiorari seems to be that the judgment against the Southern Express Company was without personal service of process, or its equivalent, and that it was therefore a void judgment and could be so treated in this proceeding; in brief the appellant seems to claim that process served under clause 3, section 1294-G, Pollard's Code of Virginia, 1904, considered with reference to the Federal constitution and the decisions of the Supreme Court of the United States is not due process of law.

A state may exclude a foreign corporation altogether and it may therefore admit it on such conditions as the state may choose to impose.

> "If a foreign corporation voluntarily does business within the State, it is bound by a reasonable regulation of that business imposed by the State, not because it is found there, not because it has consented to those regulations, but because it is as reasonable and just to subject the corporation to those regulations as though it had consented. The jurisdiction is based upon the control of the State resulting from the voluntary act of the corporation in doing business within the State, not from its voluntary consent to be bound by the laws of the State."
>
> Fundamental of Procedure in Actions at Law—Austin Wakeman Scott, p. 56.

Conceding that the Southern Express Company was not present in the State of Virginia when process was served, nevertheless the state had a right to confer upon its courts jurisdiction over the company as to causes of action which arose in the state before the withdrawal, and it did this by providing that upon the removal, resignation or death of the person designated as the agent upon whom process against a foreign express company could be had, service of process might be upon the chairman of the State Corporation Commission with like effect as upon the agent appointed by the Company. Section 1294-G, Code of 1904 (R. pp. 7-8).

In the case of *Mutual Reserve Association* v. *Phelps*, 190 U. S. 147, a Kentucky statute provided that before commencing to do business, foreign corporations must file with the commissioner of insurance a resolution of the Board of Directors consenting to service of process upon any agent or upon the insurance commissioner. On May 10th, 1893, the Mutual Reserve Association filed the resolution required by law; on October 10th, 1899, the insurance commissioner cancelled the license and notified the Mutual Reserve Association that its authority to do business in Kentucky had been revoked and from that date said association had no agent in Kentucky and did no new business whatsoever in the state. On February 28, 1900, Phelps commenced an action in the Circuit Court of Jefferson County, Kentucky, against the Mutual Reserve Association, alleging that on July 16th, his application for membership had been approved and a certificate of insurance issued to him. A summons

was issued and served on the insurance commissioner and the defendant appeared specially and moved to quash the service. The motion was over-ruled and defendant taking no further action, judgment was rendered on May 19th, 1900, in favor of the plaintiff. After this judgment had been obtained, the association brought suit to enjoin its enforcement, alleging that the service of summons on the insurance commissioner was insufficient to bring it into the state court as a party defendant, and that the judgment rendered in the case was void. The case finally reached the Supreme Court of the United States, and that court, speaking by Mr. Justice Brewer, said:

> "The plaintiff was a citizen of Kentucky, and the cause of action arose out of transactions had between the plaintiff and defendant while the latter was carrying on business in the State of Kentucky under license from the State. Under these circumstances, the authority of the insurance commissioner to receive summons in behalf of the association was sufficient."

In *Hunter* v. *Mutual Reserve Life Insurance Company*, 218 U. S. 573, Hunter sued the Insurance Company in the State of New York upon five judgments obtained in the State of North Carolina. The judgments in North Carolina were obtained by default after service made upon the insurance commissioner of the State of North Carolina on five policies issued by the Mutual Reserve Life Insurance Company, a New York corporation, one of which said policies was issued to a citizen of North Carolina while the com-

pany was doing business in North Carolina and before it had removed from the state and four of which said policies had been issued to citizens of New York and New Jersey and assigned to a citizen of North Carolina for the purpose of having suit brought in North Carolina. The trial court in New York rendered judgment for the full amount of the five policies, but on appeal the Court of Appeals of the State of New York reversed the judgment as to the four policies issued to citizens of New York and New Jersey and affirmed the judgment as to the policy issued to a citizen of North Carolina while the company was doing business in North Carolina.

The Federal question raised was that due faith and credit had been refused the judgments obtained in North Carolina on the four policies issued in New York and New Jersey, and an appeal was taken to the Supreme Court of the United States which affirmed the judgment of the Court of Appeals of the State of New York.

We respectfully submit that in the case of F. S. Royster Guano Company against Southern Express Company, jurisdiction was acquired by the Circuit Court for the city of Norfolk, Virginia, by personal service of the summons within the state upon Hon. William F. Rhea, chairman of the State Corporation Commission under the authority of clause 3, section 1294-G, Pollard's Code, 1904, and that the State Court was right in overruling the motion to quash the service and writ in the action. (R. pp. 29-30).

IT IS GENERALLY HELD THAT WHEN A CORPORATION TAKES OVER ALL THE PROPERTY OF ANOTHER, PAYING THEREFOR IN CAPITAL STOCK, THE TRANSACTION IS A CONSOLIDATION AND THE CONSOLIDATED CORPORATION BECOMES LIABLE FOR THE DEBTS AND LIABILITIES OF THE CONSTITUENT CORPORATIONS.

In the instant case, defendant in error filed interrogatories in accordance with Section 6236 of the Code of Virginia, and in its answer to these interrogatories plaintiff in error makes the following statements (R. p. 18):

> "The American Railway Express Company purchased on June 30th, 1918, the tangible property used in the express business theretofore owned by the Southern Express Company and paid for the same with shares of its capital stock.
>
> The valuation placed on the property purchased from the Southern Express Company cannot be given as the Southern Express Company was owned by the Adams Express Company and the value of their tangible property was included in the value of the property purchased from the Adams-Southern Companies.
>
> All of the property purchased from the Adams Companies was paid for with capital stock of the American Railway Express Company.
>
> 10,000 shares of stock of the American Railway Express were issued in the name of the

> Southern Express Company at the request and direction of the Adams and Southern Express Companies." Record, p. 18.

It thus appears that the Southern Express Company, without paying its debts or providing for its liabilities, transferred its corporate assets in Virginia and elsewhere to the American Railway Express Company and accepted 10,000 shares of stock of the American Railway Express Company therefor. This was not a purchase of the assets and property of the Southern Express Company, it was simply an absorption of the Southern Express Company into the American Railway Express Company, and this action at law was instituted for the purpose of compelling the American Railway Express Company to satisfy the claim of a creditor of the Southern Express Company out of assets received from the Southern Express Company. The transaction is out of the ordinary course of business and the circumstances of the case imply knowledge on the part of the American Railway Express Company of all facts necessary to charge the property in its hands received from the Southern Express Company with the debts and liabilities of the Southern Express Company.

With deference it is submitted that the governing principle in this case is that the Southern Express Company could not transfer its assets for stock to the prejudice of its creditors without rendering the transferee personally liable for the debts of the Southern Express Company.

7 Ruling Case Law, p. 181, Section 155.

In the case of *Jennings Neff Co.* v. *Crystal Ice Co.* (Tenn.), 159 S. W. 1088, the Crystal Ice Company

transferred its plants and assets to the Atlantic Ice & Coal Company, and ceased its business of manufacturing ice. The only consideration received by the Crystal Ice Company for its assets was stock and bonds of the Atlantic Company. The suit of Jennings Neff & Company was pending against the Crystal Company when it was absorbed by the Atlantic Company and a judgment was recovered against the Crystal Company. In holding that the Atlantic Company was liable to Jennings Neff & Company for the amount of this judgment, the court said:

> "From the foregoing, it is seen that we have presented to us a case in which one corporation has acquired practically the entire assets of another in exchange for the stock and bonds of the purchasing company. The selling company retains no property and goes out of business. This is not, strictly speaking, a legal merger because the selling company retains its legal entity, although it is entirely dismantled of its assets. Such a transaction is sometimes referred to as a de facto merger. Whether the merger be de facto or de jure, the plight of the creditors of the absorbed corporation is the same. No property is left out of which they may satisfy their claims in either case in the hands of the selling corporation."

The case of *American Railway Express Company* v. *Downing*, 132 Va. 139, is similar to the instant case in every respect and in that case the American Railway Express Company was held answerable to Downing for a liability of the Adams Express Company which existed at the time of the absorption. See also

Sanford v. *Detroit &c. Ry.* (Mich.) 89 N. W. 960.
Howell v. *Lansing* (Mich.) 109 N. W. 846.
Atlantic &c. v. *Johnson* (Ga.) 56 S. E. 482.

As an answer to appellant's contention that the remedy of creditors of the Southern Express Company was not impaired by the sale of its property and withdrawal from the State of Virginia, it is submitted for the consideration of the court that the Southern Express Company left unsettled a great many, possibly hundreds of small claims, most of which were less than one hundred dollars, and unless the American Railway Express Company can be compelled to satisfy these claims, they are worthless, for the small creditors of the Southern Express Company cannot afford the cost of litigating them in foreign states. Furthermore if by the transfer of its property, the right was lost to Virginia creditors of the Southern Express Company to have their claims adjudicated by Virginia courts as contended by appellant, where can they sue? The Southern Express Company is a corporation under the laws of the State of Georgia, but after long and expensive litigation in that state it would probably transpire that the company had no property located in Georgia. Appellant seems to invite litigation in New York by admitting that the Southern Express Company has property there (brief p. 40) but if suit were brought in New York on a transitory cause of action which arose in Virginia the Southern Express Company would probably contend that the loss occurred while it was doing business in Virginia and that therefore suit should have been brought in that state.

Much is said in appellant's brief about its constitutional rights, but, with deference, we submit that corporations cannot escape liabilities incurred before the absorption of one by the other by the simple method of transferring property for stock, if the transfer hinders delays and defrauds creditors; and the corporation taking over the assets is not denied equal protection of the law or deprived of its property without due process of law because it is held liable for the debts of the transferer corporation.

Respectfully submitted,

F. S. ROYSTER GUANO COMPANY,

By

CADWALLADER J. COLLINS,

Attorney for Defendant in Error.